United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

B p/s

74-1503

To be argued by
DANIEL J. PYKETT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1503

UNITED STATES OF AMERICA,

Appellee,

—v—

JEREMIAH EDWARD SCANLON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DANIEL J. PYKETT,
Special Assistant United States Attorney.
S. ANDREW SCHAFFER,
Assistant United States Attorney,
Of Counsel.

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CASES CITED

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Preliminary Statement

Jeremiah Edward Scanlon appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York after a plea of guilty before the Honorable Edward Weinfeld, United States District Judge on December 4, 1973.

Indictment S. 73 Cr. 790, filed August 10, 1973, charged Scanlon in two counts with violating the federal narcotics laws. Specifically, Count I of the indictment charged the defendant and others with conspiring, from June 5, 1973 to August 10, 1973, to violate Title 21, United States Code, Section 846. Count II charged Scanlon with attempted distribution and possession with intent to distribute cocaine.

On December 4, 1973, Scanlon entered a plea of guilty to Count One of the indictment.

On January 24, 1974, Judge Weinfeld sentenced Scanlon to two years imprisonment to be followed by three years special parole. After sentence was imposed, Count II of the indictment was dimsissed on the defendant's motion with the consent of the Government. Scanlon is presently serving his sentence.

Statement of Facts

On June 8, 1973, Jeremiah Edward Scanlon was arrested by agents from the Bureau of Narcotics and Dangerous Drugs and was arraigned before a United States Magistrate on June 9, 1973 on a complaint which charged the defendant with possession of cocaine with intent to distribute. On June 11, 1973 an application was made by the Government to increase the bail which had been fixed at the June 9 arraignment. A bail hearing was held before the Magistrate on June 11 and 12, 1973 at which time two agents from the Bureau of Narcotics and Dangerous Drugs testified (A. 12, 13, 16, 17, 21).* The recording equipment used by the Magistrate to record the hearing malfunctioned and the testimony was therefore not preserved (A. 45, 46). On October 30, 1973 defendant moved to dismiss the indictment based upon the failure of the Government to provide a transcript of the June 11 and 12, 1973 hearing before the Magistrate (see page 2 Crim. Docket 73 Cr. 790).** On November 27, 1973 Judge Weinfeld denied the motion (A. 55). A trial date was set for December 4, 1973 and on that date defendant filed motion papers seeking, among other things, the suppression of any statements made by the defendant to agents of the Government (see page 3 Criminal Docket 73 Cr. 700). When the case was called for trial on Decem-

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* "A" denotes the Appendix for Appellant.

** The Criminal Docket was not filed with Appellant's Appendix as required by Rule 10a of the Federal Rules of Appellate Procedure. The Government has, therefore, reproduced the docket entries at the end of its brief.

ber 4, 1973 defendant withdrew his previously entered plea of not guilty and entered a plea of guilty to Count I of the indictment (A. 57-65). On December 5, 1973 Judge Weinfeld adjudged moot the defendant's undecided motion to suppress statements of the defendant in view of the plea of guilty (see page 3 Criminal Docket 73 Crim. 790).

ARGUMENT

POINT I

The defendant's plea of guilty precludes this appeal.

A plea of guilty to an indictment is an admission of guilt and a waiver of all non-jurisdictional defects. *United States* v. *Spada*, 331 F.2d 995, 996 (2d Cir.), *cert. denied*, 379 U.S. 865, 85 S. Ct. 130, 13 L.Ed. 2d 67 (1964), *United States* v. *Doyle*, 348 F.2d 715, 718 (2d Cir.), *cert. denied*, 382 U.S. 843, 86 S.Ct. 89, 15 L.Ed. 2d 84 (1965); *United States* v. *Selby*, 476 F.2d 965 (2d Cir. 1973).

A point may be preserved for appeal, despite a plea of guilty, provided there is a reservation of the point for appeal accepted by the Court with the consent of the Government. *United States* v. *Doyle, supra; United States* v. *Mann*, 451 F.2d 346 (2d Cir., 1971); *United States* v. *D'Amato*, 436 F.2d 52, 53 (3d Cir. 1970). The reservation of the right to appeal a non-jurisdictional issue must be clearly stated in writing or on the trial record. *United States* v .*Mann, supra.*

The issues raised by defendant on appeal are all non-jurisdictional and, there having been no reservation of right to appeal these issues when defendant entered his plea of guilty, they must be deemed to have been waived.

POINT II

Even were appellant's claims properly before the Court, they afford no basis for relief.

The three issues raised by the defendant are: (1) that certain post-arrest statements were obtained from the defendant based on his lack of understanding of his constitutional rights; (2) that the defendant could not legally have been found guilty of the crimes charges in the indictment because the substance which he in fact possessed (lidocaine and procaine) was not a controlled substance; and (3) that the indictment should have been dismissed because the malfunctioning of a recording machine used by the United States Magistrate at a bail hearing resulted in the unavailability of impeachment material for use at trial. These claims afford no basis for the reversal of the defendant's conviction. Moreover, the defendant has never even moved in the District Court to withdraw his plea of guilty on any of the grounds alleged here as error.

First, as far as the post arrest statements are concerned, the defendant elected to plead guilty before a hearing could be held on merits of his claim. In any event, even if improperly obtained, the statements were never used against him. *United States ex rel Piracci* v. *Follette*, 284 F. Supp. 267 (S.D.N.Y. 1968); *Tingler* v. *Cox*, 315 F. Supp. 871 (1970); *Cooper* v. *Peyton*, 295 F. Supp. 21 (W.D. Va., 1968).

Second, the fact that Scanlon may have possessed an uncontrolled substance, procaine, rather than cocaine would not be a defense to the conspiracy charge to which he pleaded guilty since he conspired to distribute and possess cocaine (A. 65). *United States* v. *Jacobs*, 475 F.2d 270, 282 (2d Cir. 1973); Developments in the Law—Criminal Conspiracy, 72 Harvard L. Rev. 920, 945 (1959). Nor would that fact have precluded a conviction for attempted possession of cocaine under Count Two. *United States* v. *Roman*, 356

F. Supp. 434, 438, *affirmed per curiam*, 484 F.2d 1271 (2d Cir. 1973).

Third, the unavailability for impeachment purposes of the testimony from the bail hearing due to a fortuitous malfunction of the Magistrate's recording machine created no handicap to the defense since there was no trial and no cross-examination of witnesses. Even had there been a trial, Scanlon could have impeached the Government's testimony by calling those present at the bail hearing to establish claimed contradictions and inconsistencies between the testimony given on the separate occasions. Indeed, in denying Scanlon's motion to dismiss the indictment because of the recording malfunction, Judge Weinfeld indicated that he would allow the defendant to testify, if he wished, on the limited issue of what had been said at the bail hearing (A. 40).

Scanlon strenuously argues that the hearing before the Magistrate was not a bail hearing but a preliminary hearing. Thus he claims Rule 5(c)(1) of the Federal Rules of Criminal Procedure becomes applicable and the inability of the Magistrate to supply him with a fully audible recording of the hearing violated that Rule and entitled him to a dismissal of the indictment. Such a contention is unsupported by the Rule or by applicable case law. The Magistrate complied with the non-mandatory language of the Rule and supplied defense counsel with the recording made at the hearing. Through no one's fault, the recording was inaudible. Such accidental deprivation is not a violation of the Rule. See e.g. *Gardner* v. *United States*, 407 F.2d 1266 (D.C. Cir., 1969), *cert. denied*, 395 U.S. 911 (1969); *United States* v. *Robinson*, 459 F.2d 1164, 1170-71 (D.C. Cir. 1972).

The authorities relied on by Scanlon are wholly inapposite. Scanlon was not an indigent who was consciously denied a transcript which would have been available to a wealthy defendant and thus deprived of equal protection

of the law as in *United States ex. rel. Wilson* v. *McMann*, 408 F.2d 896 (2d Cir. 1969). Even assuming that the hearing held before the Magistrate was a full fledged preliminary hearing, a defendant has no absolute right to the testimony on which probable cause is based. *United States* v. *Cramer*, 447 F.2d 210, 213-14 (2d Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972); *United States* v. *Ayers*, 426 F.2d 524 (2d Cir.), *cert. denied*, 400 U.S. 842 (1970). Ineed, in Ayers, this Court upheld a conviction where grand jury testimony had been recorded and could have been transcribed pursuant to a defense request but the trial court refused to order it done. Since a defendant is not entitled to a preliminary hearing if probable cause is established by the return of an indictment, the fact that a preliminary hearing may have been held would not appear to give a defendant any absolute right to discover the testimony on which probable cause was based. And surely the accidental and completely unintended unavailability of the testimony of a preliminary hearing would not give rise to a remedy more drastic than that provided by the intentional and wrongful denial of available grand jury minutes. In the latter case, the remedy would not be dismissal of the indictment, but rather the striking of the testimony of a trial witness whose prior statements before the grand jury were not made available for use as impeachment material. *United States* v. *Cramer, supra*, 447 F.2d at 214; see also 18 U.S.C. § 3500(d).

CONCLUSION

The conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DANIEL J. PYKETT,
Special Assistant United States Attorney.
S. ANDREW SCHAFFER,
Assistant United States Attorney,
Of Counsel.

APPENDIX

Docket Entries

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES

—v—

JERMIAH SCANLON, PATRICIA ANN SADOWSKY and JANE DOE a/k/a Sue

Date	*Proceedings*
8-10-73	Filed Indictment. (This matter is related to 73 Cr 746)
8-10-73	Jermiah Scanlon—Oral application for reduction of bail granted. Bail reduced to $1500 cash or surety bond to cover this indictment "S" 73 Cr 746. Deft REMANDED in lieu of bail, motions are to be made returnable Sept. 11, 1973, Weinfeld, J.
8-13-73	JERMIAH SCANLON—PLEADS NOT GUILTY, Remanded in lieu of bail previously fixed. PATRICIA ANN SADOWSKY—Court enters PLEA OF NOT GUILTY. Deft. not present. WYATT, J.
8-30-73	Jeremiah Scanlon—Filed appearance bond in the sum of $1,500.00 (receipt #26513)—Clerk (also for 73 CR 746 and filed in 73 CR 746))
8-31-73	SCANLON—Filed order extending defts. bail limits on consent of Government to include the Eastern District of New York—Weinfeld, J. (filed in 73 CR 746)

Date *Proceedings*

8-28-73—SADOWSKY—Deft. withdraws plea of not guilty and pleads guilty (Atty. Peter Kaiser present) to count 1 only. P.S.I. ordered. Deft. ordered photographed and fingerprinted. Sentence adj. to 10-5-73 at 10 A.M. Deft. R.O.R.—Weinfeld, J.

9-11-73—SCANLON—Filed affdvt. and notice of motion for an order extending time to prepare motions.—ret. 9-11-73

9-13-73—SCANLON—Filed memo endorsed on above motion: "Motion granted upon condition Stauart R. Shaw, Esq., filed a notice of appearance forthwith. Call Calender and motions, if any, ret. 9-125-73 at 2:15 PM—So ordered.—Weinfeld, J. (m/n)

Sep-25-73—SCANLON—Filed govt. affdt. for W/C—writ issued, ret. 9/26/73.

Sep-25-73—SCANLON—Call Calendar adj. to 9-26-73 at 2:30 PM—Weinfeld, J.

Sep-26-73—SCANLON—Deft. produced on writ—Motions ret. Oct-10-73—writ satisfied—Weinfeld, J.

Oct-5-73—SADOWSKY—Sentence adj. to 11-26-73 at 10 AM —Rm. 1305. Deft. R.O.R.—Weinfeld, J.

Oct-5-73—Filed one envelope ordered sealed and impounded (placed in vault Rm 602)—Weinfeld, J.

Oct-15-73—SCANLON—Filed Writ of H/C—writ satisfied on 9-26-73—Weinfeld, J.

Oct-30-73—SCANLON—Filed affdvt. and notice of motion to dismiss indictment—re-10-31-73 at 10:00 AM

Nov. 26-73—PATRICIA ANN SADOWSKY—(atty. present) —filed JUDGMENT—that the deft. is sentenced as a Youth Offender pursuant to Section 5010(a) of Title 18, U.S. Code. Imposition of sentence on Count 1 is sus-

Date *Proceedings*

pended. Deft. placed on probation for a period of 3 years subject to the standing probation order of this Court. Special Condition of probation being that the deft. will comply with all directions as may be made by the Probation Dept. as far as psychiatric treatment is concerned. Weinfeld, J. (copies issued 11/28/73).

Nov. 30-73—SCANLON—Filed defts. atty's. affirmation for adjournment of trial date.

Nov. 28-73—SCANLON—Filed govt's. affdt. (by John P. Cooney) for a W/H/C—Writ issued. Ret. on Nov. 29, 1973.

Nov. 21-73—SCANLON—Filed W/H/C—Writ satisfied 11/1/73. Weinfeld, J.

Dec. 4-73—SCANLON—Filed Notice of Motion for Discovery and inspection, Bill of Particulars, Suppression of Evidence and statements and attorney's affirmation in support of motion, returnable 12/4/73 at 10:30 A.M.

Nov. 30-73—Filed Affidavit of Frederick S. Lough

Nov. 30-73—Filed Supplementary Affirmation of Roland Thau

Nov. 30-73—Filed Govt. Affidavit of John P. Cooney, Jr., in opposition to deft. Scanlon's motion to dismiss indictment.

Nov. 30-73—Filed Govt. Memorandum of Law

Nov. 30-73—Filed Supplemental Affidavit of John P. Cooney, Jr.

Nov. 30-73—Filed Memo-endorsed on Notice of Motion for Dismissal of indictment dtd 10/30/70—The motion to dismiss the indictment is denied, as indicated, Weinfeld, J. (m/n)

Dec. 4-73—JEREMIAH EDWARD SCANLON—Produced on writ—Deft. withdraws plea of not guilty and PLEADS GUILTY (Atty. Stuart R. Shaw present) to count 1 only. Pre-sentence investigation ordered. Writ and sentence adjourned to 1/11/74 at 9:30 A.M. Rm. 2704.

Date *Proceedings*

JANE DOE a/k/a Sue—Bench Warrant ordered. Bench Warrant issued.

PATRICIA ANN SADOWSKY—Government's oral motion to dismiss count 2 GRANTED. Weinfeld J.

Dec. 5-73—JEREMIAH EDWARD SCANLON—Filed Deft's Notice of Motion for discovery and inspection Bill of Particulars, Suppression of Evidence and Statements. Ret. 12/4/73

Dec. 5-73—SCANLON—Filed memo—endorsed on the above Notice of Motion.—This motion is rendered moot in view of deft's plea of guilty to count 1 entered this day. Weinfeld, J. (m/n)

Jan. 15-74—SCANLON—Produced on writ. Sentence adjourned to 1/24/74 at 9:30 A.M. Writ Satisfied—Weinfeld, J.

Jan. 21-74—SCANLON—Filed Affidavit for Writ of Habeas Corpus Ad Prosequendum.

Jan. 24-74—SCANLON, Jeremiah Edward—FILED JUDGMENT (atty present) It is adjudged that the defendant is heerby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on count 1. Pursuant to the provisions of Title 21, Section 841 U.S. Code, defendant is placed on SPECIAL PAROLE for a period of THREE (3) YEARS to commence upon expiration of confinement. Count 2 is dismissed on motion of defendant's counsel with the consent of the Government. WEINFELD, J. (copies issued)

Jan. 22-74—SCANLON—Filed Writ of Habeas Corpus Ad Prsequendum—Writ Satisfied—

Jan. 25-74—SCANLON—Writ satisfied—Brient, J.

Date *Proceedings*

Feb. 11-74—JEREMIAH SCANLON—Filed Notice of Appeal to U.S.C.A. 2nd Circuit, from the sentence of two years. Mailed notice to deft. (via attorney for deft.) and the U.S. Attorney's office.

Feb. 19-74—JEREMIAH SCANLON—Filed Memo-endorsed on letter dtd 2/9/74—This defendant's plea of guilty was entered when represented by private counsel. The motion for appointment of counsel is denied—So ordered —Weinfeld, J. (m/n)

Feb. 11-74—Filed Notice of Appeal to U.S.C.A. from the sentence of two years on 2/24/74—

Mr. 4-74—Filed Original record transmitted to the U.S.C.A. this date.

3-19-74—JANE DOE—Statistically closed as Deft. is a FUGITIVE.

6-17-74—SCANLON—Filed Commitment & entered return, Deft. Delivered to the (ILLEGIBLE)

6-14-74—SCANLON—Filed supplemental record on appeal U.S.C.A. 6-14-74

7-12-74—Filed Transcript of record of proceedings, dated Jan. 15, 1974.

★ U. S. Government Printing Office 1974—614—240 / 391—74

Form 280 A - Affidavit of Service by Mail

DJP:emw
73-3731

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DANIEL J. PYKETT being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29th day of July, 1974 he served a copy of the within BRIEF for the United STATES of AMERICA. by placing the same in a properly postpaid franked envelope addressed:

STUART R. SHAW, ESQ.
233 Broadway
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Daniel J. Pykett

Sworn to before me this

29th day of July, 1974

Mary L. Avent

MARY L. AVENT,
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. Filed in Bronx County
Commission Expires March 30, 19[illegible]